



# ANOTHER MISTAKE - IN THE MATTER OF THE D TRUST, THE E TRUST AND THE F TRUST

DECEMBER 2016

Since the codification of the remedy of mistake in Article 47E of the Trusts (Jersey) Law 1984 (the "Law") applications are increasingly made to the Jersey Royal Court by settlors of trusts seeking for them to be set aside. *In the Matter of the D Trust, the E Trust and the F Trust* concerned an application to set aside certain transfers of assets rather than the trusts themselves. Three trusts had been established following US tax advice with a view to ensuring that, among other things, the two US-resident sons of the settlor, who was Swiss resident, were not taxed on any distributions and on the death of any of them, the trusts would not be subject to US tax.

The settlor became aware of the potential enactment of a 20% estate tax in Switzerland (although ironically this never came to be). The settlor held his interest in a large corporation whose shares were internationally listed through two Luxembourg companies. Following advice the three trusts were amended and shares in the Luxembourg companies were transferred to the three trusts, subject to a right of enjoyment for his lifetime to exercise the voting rights in the shares. Unfortunately, the amendments to the trusts gave rise to a serious US tax problem. The settlor applied to have the transfers set aside and declared void on the grounds of mistake. To set aside a transfer of property to a trust the Court must ask itself three questions, namely:

1. Was there a mistake on the part of the settlor?
2. Would the settlor not have made the transfers "but for" the mistake? and
3. Was the mistake of so serious a character as to render it just for the Court to make a declaration?

The Court found that the settlor believed that in making the transfers to the trusts in their amended form he was not only achieving the US tax objectives but also nullifying any risk which arose from the potential Swiss tax issue. It stated that the settlor had made a mistake and would not have made the transfers "but for" that mistake. As to the third question, applications under Article 47E are usually brought where there has been a mistake which gives rise to an *actual* tax liability. Here, the tax liability was *contingent* upon either of the sons dying during the trust period (which expired in 2041). The Court concluded that, as the potential tax bill for their estates was huge, such a contingent risk rendered it just that the transfers be set aside.

The Court also considered the firewall provisions of Article 9 of the Law. Whilst Swiss law applied to the transfers of the shares in the Luxembourg companies the Court confirmed the applicability of Article 9 (any question concerning the validity or effect of any transfer or other disposition of property to a trust is to be determined in accordance with the law of Jersey).

The decision provides confirmation of the approach of the Jersey courts to applications involving mistake and of the engagement of the

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firewall provisions of the Law where assets are transferred which may be the subject of different laws.

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